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No.

ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States

October Term, 1983

PRESSROOM UNIONS-PRINTERS LEAGUE
INCOME SECURITY FUND,

Petitioner,

against

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employee benefit plan may maintain an action for breach of fiduciary responsibility under the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §1001 *et. seq.*?

2. Whether a federal court has subject matter jurisdiction over a suit by an employee benefit plan pursuant to Section 502 of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §1132?

PARTIES TO THE PROCEEDING

Petitioner Pressroom Unions-Printers League Income Security Fund respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit; petition for rehearing denied on April 7, 1983. Respondents are Continental Assurance Co., Reserve Life Insurance Co., American Progressive Life & Health Insurance Company of New York, George S. Kriegler, Benjamin A. Kriegler, Labor Security Programs, Inc., and Raymond M. Kriegler, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to Petitioner, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased.

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

The Petitioner, Pressroom Unions-Printers League Income Security Fund (the "Fund"), hereby requests the issuance of an order granting *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 18, 1983, Petition for Rehearing denied on April 7, 1983.

CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit has been reported at 700 F.2d 889 (2d Cir. 1983) and at 4 E.B.C. (BNA) 1112 and is included within the Appendix for Petitioner submitted herein, commencing at page 1a. The Opinions and Orders of the United States District Court for the Southern District of New York have been unofficially reported at 3 E.B.C. (BNA) 1946 and 3 E.B.C. (BNA) 1949 and appear in the Appendix for Petitioner, commencing at page 21a. The Order of the Court of Appeals for the Second Circuit denying rehearing has not been reported and appears in the Appendix for Petitioner commencing at page 18a.

JURISDICTION

The judgment of the Court of Appeals was filed on February 18, 1983 (Appendix for Petitioner at page 1a) and an order denying the petition for rehearing, except on certain limited grounds, was filed on April 7, 1983 (Appendix for Petitioner at page 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security of 1974, *as amended* ("ERISA"), Section 502, 29 U.S.C. Section 1132:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b)(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the

Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

The Court of Appeals' decision involves the significant federal questions of whether an "employee benefit plan" has standing to bring an action for breach of fiduciary responsibility under ERISA and whether a federal court has subject matter jurisdiction over such suits.¹ It is an issue of first impression of important questions of federal law which have not been, but should be, settled by this Court. Further, as discussed *infra*, there is a split of authority in the Circuit Courts of Appeals.

This action was commenced on January 29, 1982, by Petitioner Pressroom Unions-Printers League Income Security Fund. The jurisdiction of the District Court was invoked pursuant to, *inter alia*, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) and 29 U.S.C. § 308(g).

The Fund is established and operated in accordance with Section 302(c) of the Labor Management Relations Act of 1947, *as amended*, ("LMRA"), 29 U.S.C. § 186(c). The Fund was created in 1971 through collective bargaining negotiations between the Printers League of Metropolitan New York and New York Printing Pressmen's & Offset Workers Union Local No. 51, to provide life insurance and mutual fund benefits to its participants.² The Fund is maintained by employer contributions made pursuant to collectively bargained agreements negotiated between the respective local unions and the employer members of

1. "Employee benefit plan" is defined in ERISA § 3(3), 29 U.S.C. § 1002(3).

2. In May 1975, employees represented by New York Press Assistants and Offset Workers Union No. 23, I.P.P. & A.U. of N.A. were added. In May 1976, employees represented by Paper Handlers and Sheet Straighteners Union No. 1, I.P.P. & A.U. of N.A. were added, however they withdrew in May 1979.

the Printers League. As required under LMRA § 302(c), the Fund is managed by a board of trustees comprised of an equal number of employer-appointed and union-appointed members. The Fund presently has approximately 1700 participants.

The Fund alleges that between July, 1971, and July, 1980, the defendants, insurance companies who had underwritten all of the life insurance for the Fund, together with various administrators and fiduciaries with respect to the Fund, conspired to, and did perpetuate a fraudulent scheme to extract millions of dollars in exorbitant insurance premiums, commissions and fees from the Fund. The action alleges that the defendants defrauded the Fund and breached their fiduciary duties to the Fund, in violation of ERISA §§ 404(a)(1)(A), 406(b)(1) and 406(b)(2), 29 U.S.C. §§ 1104(a)(1)(A), 1106(b)(1), and 1106(b)(2), and seeks recovery of losses pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a); in addition, damages for common law fraud and unjust enrichment are sought.

On April 16, 1982, co-defendants George S. Kriegler, Benjamin A. Kriegler, Raymond M. Kriegler, and Reserve Life Insurance Company and American Progressive Life and Health Insurance Company moved to dismiss on the ground that ERISA § 502(e)(1) does not grant subject matter jurisdiction over claims asserted by an employee benefit fund, and/or such fund lacks standing to bring ERISA claims.

On June 3, 1982, Judge William C. Connor of the District Court for the Southern District of New York granted defendants' Motion to Dismiss the Complaint. The court held that only the Secretary of Labor, participants, beneficiaries and fiduciaries, as defined in ERISA, have standing to prosecute a civil action under ERISA, and that the jurisdiction of the district courts is limited to actions brought by such parties. Further, Judge Connor held that § 502(d) of ERISA, providing that an employee benefit plan may sue or be sued as a entity, only addresses the legal capacity of the Fund to sue or to be sued as an entity, and not jurisdiction or

standing. Thus, the court dismissed the Fund's ERISA claims for lack of subject matter jurisdiction. The court also denied the Fund's motion to amend the complaint to add a proper plaintiff.

On June 11, 1982, the Fund petitioned for reargument of only so much of the Opinion and Order as denied it leave to amend the complaint to substitute individual plan participants and/or trustees as plaintiffs. On August 2, 1982, Judge Connor issued a supplemental order denying the Fund's motion on the grounds that, since the court lacked jurisdiction over the action, it did not have subject matter jurisdiction to permit an "amendment" substituting other plaintiffs and thus retroactively giving the court jurisdiction.

The Fund appealed Judge Connor's decisions to the United States Court of Appeals for the Second Circuit. In an Opinion by the Honorable Irving R. Kaufman, to which the Honorable William H. Timbers and the Honorable Jon O. Newman concurred, the court affirmed Judge Connor's decisions. The Court of Appeals held that the Secretary of Labor, participants, beneficiaries, or fiduciaries have the exclusive right of suing under ERISA. The Court of Appeals further held that § 502(d) does not permit funds to bring actions under ERISA; it only allows funds to bring suits in other situations where there would properly be jurisdiction. Further, because the district court lacked subject matter jurisdiction, it properly denied the request to amend the complaint.

The Fund petitioned for a rehearing which was denied by an order dated April 7, 1983.³

3. The Court of Appeals for the Second Circuit did amend its February 19, 1983, Order by noting in a footnote that the district court had properly exercised its discretion to grant or deny a motion to amend to add a party which would bring the case within the district court's jurisdiction. Petitioner respectfully submits that this Court consider this issue as a necessary adjunct to the issue of whether the Fund can sue under ERISA.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case is of first impression of important questions of federal law and involves issues of enormous public importance over which the Court of Appeals for the Second Circuit is in conflict with the Court of Appeals for the Seventh, Ninth, and arguably Third Circuits: the questions presented are whether an employee benefit plan has standing to sue for violations of ERISA and whether a federal court has subject matter jurisdiction over such suits. If the decision of the Court of Appeals below is permitted to stand, a great inequity and irony will result: employee benefit plans will be prevented from bringing actions to enforce ERISA.

The Opinion of the Court of Appeals below restrictively construed the specific language of ERISA. In finding that a clear legislative mandate was necessary in order to confer jurisdiction over actions brought by employee benefit plans, the Court of Appeals narrowly interpreted Section 502(d). However, ERISA is a remedial statute which should be construed liberally.

In addition, the Court of Appeals noted that the language of Section 502(d) makes this case "both unique and difficult." 700 F.2d at 892. The Court of Appeals analyzed Section 502(d) and concluded that the section does not imply that funds may bring action under ERISA; rather it merely authorizes suits to be brought by funds in situations where there would be jurisdiction. As an example the Court of Appeals noted that a fund could pursue a state law contract claim in its own name. Thus, by an overly technical construction of the statute, the Court of Appeals below reached the untenable result that funds may bring contract actions, but not actions to enforce ERISA.

Accordingly, this Court should review the decision of the Second Circuit and, upon review, reverse that decision.

B. The Second Circuit's Decision That Sections 502(a) and (e) of ERISA Set Forth Exclusive Grants of Standing and Jurisdiction Conflicts With Decisions of the Courts of Appeals for the Third, Seventh, and Ninth Circuits

In *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982), a contributing employer brought an action against a pension fund alleging violations of ERISA. The Court of Appeals for the Ninth Circuit held that the company had standing to sue under ERISA. In reaching this result, the Circuit Court applied this Court's holding in *Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970) to determine that the company had standing to sue under ERISA. The Court of Appeals in *Fentron* held that in order for the company to have standing it must: (1) suffer an injury in fact; (2) fall arguably within the zone of interests protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit.

Applying this test the Court of Appeals found that the company's injuries were specific and personal and that the fund's actions threatened direct injury to the employer. Further, the Court of Appeals referred to Section 2(a) of ERISA, 29 U.S.C. § 1001(a);⁴ in holding that the company's injuries fell within the zone of interests that Congress intended to protect when it enacted ERISA.

4. Act Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the

Finally, the Court of Appeals reviewed Section 502 of ERISA and held that Congress, in enacting ERISA, did not intend to prohibit employers from suing to enforce its provisions. The Ninth Circuit Court of Appeals noted that Section 502 empowers four classes of persons to bring civil actions to enforce ERISA: (1) the Secretary of Labor; (2) participants; (3) beneficiaries; and (4) fiduciaries. However, the Court of Appeals held that the omission of employers was insignificant. Further, the Court of Appeals noted that "[t]here is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers." 674 F.2d at 1305. See also *Associated Builders & Contractors v. Carpenters Vacation and Holiday Trust Fund for Northern California*, 700 F.2d 1269, 1278 (9th Cir. 1983). Thus all requirements of the *Data Processing Service* test were met: there was an injury in fact; ERISA was designed to protect such interests; and ERISA did not preclude the suit. The test is met with equal clarity in the instant case.

Surely if a Circuit Court reads the Act to extend to employers—which are not specifically enumerated in the law, it is proper to read the law as also covering a fund. The employer, in effect, represents the interests of one business unit. A fund typically represents the interests of hundreds or thousands of individuals, i.e., the participants and beneficiaries of the plan. In this case

interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

some 1700 individuals are covered by the Fund. When this is fairly viewed it is clear that the effect on an individual covered employee is multiplied by the effect on that individual's family. Thus clearly thousands of people are represented by this Fund as participants or direct or indirect beneficiaries. Moreover, most of these individuals do not have the economic means or sophistication to commence their own legal actions and this is precisely one of the reasons a multiemployer trust fund is established. The Fund, itself, has fiduciary responsibility for these individuals. The rationale applied by the Court of Appeals in *Fentron Industries, Inc.* is the correct rationale and applies with even greater force and logic in the instant case.

The Court of Appeals for the Seventh Circuit, in *Peoria Union Stock Yards Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), *reh'g denied*, Fed. Sec. L. Rep. (CCH) ¶99,162, stated without discussion, that a pension plan had standing to complain of a breach of fiduciary obligations under ERISA, citing to Section 502(a). *Id.* at 326. *See also United States Steel Corp. v. Pennsylvania Human Rel. Comm.*, 669 F.2d 124 (3d Cir. 1982) in which the Court of Appeals for the Third Circuit stated:

"ERISA is a major and very elaborate legislative enterprise intended to secure employee entitlements of immense economic value. We think that, if Congress had intended to debar an 'employer' from assuming the powers—and, more important, the manifold burdens and potential liabilities—of a 'fiduciary' with respect to an employee benefit plan, that intention would have been explicitly and unambiguously embodied in the statute."⁵

In the instant case, the Court of Appeals below erroneously rejected the analysis by the Ninth Circuit in *Fentron*. The Court of Appeals stated:

5. Petitioner below did not argue that a fund can be a beneficiary, participant, or fiduciary as those terms are defined by ERISA. The Court of Appeals below noted that it found it difficult to imagine a situation in which a fund could fulfill one of these roles." 700 F.2d at 893 (footnote 8). Petitioner respectfully requests that the Court exercise its discretion to consider this issue.

In our view, the *Fentron* court applied an inappropriate standard in resolving this issue. We focus not on whether the legislative history reveals that Congress intended to *prevent* actions by employers or other parties, but instead on whether there is any indication that the legislature intended to *grant* subject matter jurisdiction over suits by employers, funds, or other parties not listed in § 1132(e)(1). As the Ninth Circuit noted, ERISA's legislative history is silent on both of these questions, *see, e.g.,* H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5109 (1974), and we therefore conclude that absent such expression, § 1132(e)(1) should be viewed as an exclusive jurisdictional grant. (emphasis in original). 700 F.2d at 892.

Further, the Court of Appeals for the Second Circuit cited its own decision in *Stone & Webster Engineering Corp. v. Ilesley*, 690 F.2d 323 (2d Cir. 1982), to reject the Ninth Circuit's holding that an employer may bring suit under ERISA.

The Court of Appeals below analyzed Section 502 and stated that the provision of Section 502(d) providing that a fund "may sue or be sued under this subchapter as an entity" was "troubling only upon first blush." 700 F.2d at 893. The Court of Appeals held that subsection (d) only established the right of employee benefit plans to sue and be sued like corporations and other legal entities; "otherwise a pension plan would not be a legally cognizable body." 700 F.2d at 893. The Court concluded:

Affording plans the power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction. For example, if a fund became involved in a contract dispute, and wished to pursue a state law contract claim, § 1132(d)(1) would allow the fund to bring such an action in its own name. 700 F.2d at 893.

This conclusion is patently absurd. The Court is, in effect, saying in minor actions the Fund can sue in its name, but in major matters such as to enforce ERISA and protect the interests of the

participants and beneficiaries of the Fund, it cannot. Such a distinction is irrational. The Fund must protect beneficiaries and participants in every way possible and must have recourse to the federal courts to do this and to enforce ERISA.

Further, the Court of Appeals below rejected the reasoning of the Seventh and Ninth Circuits that Section 502(a) and (e) did not foreclose the possibility of parties other than the Secretary of Labor, participants, beneficiaries, and fiduciaries, bringing actions under ERISA. The Court of Appeals for the Second Circuit, in *dicta*, stated:

It is more probable that Congress's use of the words "or sue as an entity" in § 1132(d)(1) were not considered in the context of standing or jurisdiction. This interpretation is both more plausible than the Fund's view, and, as we have noted, resolves the superficial ambiguity between § 1132(d)(1) and the standing and jurisdictional provisions. 700 F.2d at 893.

See also Amalgamated Industrial Union Local 44-A Health and Welfare Fund v. Webb and Killacky, Slip Opinion, (N.D. Ill. E. Div. March 24, 1983).

The reasoning of the Court of Appeals for the Second Circuit is erroneous and illogical. The Court's decision resolves the "uncertainty" generated by the specific language of Section 502(d) by creating a ridiculous dichotomy: an employee benefit plan may sue to pursue a state law contract claim, but may not sue to enforce the fiduciary provisions of ERISA.

Further, the Court of Appeals rejection of the Ninth Circuit's reasoning in *Fentron* constitutes a rejection of this Court's reasoning in *Data Processing Service*, upon which the Ninth Circuit relied. Petitioner respectfully submits that the mode of analysis set forth by the Court in *Data Processing Service* be applied to the case at bar. The Fund has suffered an injury in fact, the fraud perpetrated against the Fund falls within the zone of interests protected by ERISA, and ERISA does not preclude this suit. *See also Barlow v. Collins*, 397 U.S. 159 (1970).

Based upon the reasons set forth above, this Court should grant the instant Petition for a Writ of Certiorari in order to resolve the direct conflict among the Courts of Appeals on an issue of substantial public importance. The Court of Appeals for the Second Circuit below has held, in conflict with other Courts of Appeals, that the provisions of Section 502(a) and (e) of ERISA concerning standing and jurisdiction are exclusive. In so holding, the Court of Appeals below erroneously construed the specific provisions of ERISA, and rejected the Court's analysis in *Data Processing Service*.

If allowed to stand, the decision of the Court of Appeals may result in the dismissal of numerous pending actions in federal courts brought by employee benefit plans under ERISA. This would produce the anomalous result of denying benefits to plan participants and beneficiaries. The case at bar is a perfect example of such a tragedy. The Fund brought an action under ERISA for damages alleging a breach by fiduciaries of the Fund. Specifically the Fund has alleged that insurance companies and other related fiduciaries defrauded the Fund by charging excessive premiums, fees and commissions. If not permitted to maintain this action, the ultimate losers will be the participants and beneficiaries covered by the Fund who will not receive the benefit of the monies allegedly defrauded.

C. The Court Below Erroneously Construed the Plain Language of Sections 502(d) and (a) of ERISA

As discussed *supra*, the Court of Appeals for the Second Circuit held that § 502(d)(1) "only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities." 700 F.2d at 893. However, the Court concluded that affording plans the power to sue does not imply that they may bring actions under ERISA. This construction, however, ignores the plain meaning of Section 502(d)(1) which states, *inter alia*,

"[a]n employee benefit plan may sue or be sued *under this subchapter* as an entity." (emphasis added). "Under this subchapter" refers to Subchapter I of ERISA, under which this suit was brought.

ERISA is a complex, remedial and comprehensive federal statute divided into four subchapters which regulate nearly every aspect of the establishment, operation, and management of employee pension and welfare benefit plans in the private sector. The subchapter of ERISA which is of particular relevance to this Petition for a Writ of Certiorari is Subchapter I, constituting the "labor provisions" of ERISA. Subchapter I concerns "protection of employee benefit rights" and contains provisions concerning reporting and disclosure; participation and vesting; funding; fiduciary responsibility; and administration and enforcement. See *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 at n.1. Pursuant to Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), a fiduciary is obliged to act "solely in the interest of" and for the "exclusive purpose of providing benefits to" plan participants and beneficiaries; and also to discharge his duties with sufficient "care, skill, prudence, and diligence." The action in this case was brought by the Fund, under Subchapter I, against various fiduciaries of the Fund, alleging breach of the fiduciary provisions of Subchapter I.

The Court of Appeals below reasoned that § 502(d) permits suits "in other situations where there would properly be jurisdiction", for example, the Fund may pursue a state law contract claim. 700 F.2d at 893.⁶ This reasoning ignores the specific and plain meaning of § 502(d) which allows an employee benefit plan to sue under Subchapter I of ERISA as an entity. In determining the scope of a statute, a court must begin with the language of

6. While the Court of Appeals below affirmed the District Court's decision, it did so utilizing a different analysis. The District Court held that:

"Section 502(d) addresses neither jurisdiction nor standing, but rather the legal capacity of a fund to sue or to be sued as an entity. In other words, if a fund was also a participant, beneficiary or fiduciary so that it had standing to sue under Section 502(a), 502(d) makes it clear that it could sue as an entity."

the statute. *U. S. v. Turkette*, 452 U. S. 576, 586 (1981). Section 502(d)(1) clearly permits suits by employee benefit plans under Subchapter I of ERISA. Congress would not have adopted such broad language had it intended that Section 502(d) be read as narrowly as the Second Circuit in this case has construed it.⁷

In addition, the Second Circuit stated that "[t]here is no doubt that this section [§ 502(d)] authorizes suits against a fund." 700 F.2d at 892. Thus the Court of Appeals below tortured the language of Section 502(d) to permit employee benefit plans to be sued under ERISA, but not to sue.

Further, Section 502(a) states that a "civil action *may* be brought" by the enumerated parties therein. It does not state that a civil action *shall* be brought by *only* the parties named therein. It is axiomatic that where the words "shall" and "may" are used in the same statute or regulation, "shall" is usually interpreted to impose a mandatory obligation and "may" is usually interpreted to grant discretion. See *Farmers and Merchants Bank v. Federal Reserve Bank*, 262 U. S. 649, 662-63 (1923) (Brandeis, J.). Therefore, the Court of Appeals below should have utilized its discretion to permit the Fund to bring this action.

Finally, ERISA is a remedial statute which should be construed liberally. See, e.g., *Kross v. Western Electric*, 701 F.2d 1238 (7th Cir. 1983); H. R. Rep. No. 93-533, 93d Cong., 2d Sess. 257 (1974). The broad purposes and policies underlying the statute are described in Section 2 of ERISA.⁸ The decision by the Court of Appeals below constitutes an overly technical construction of remedial legislation and should be overruled. As discussed by this Court in *Nachman, supra*, and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U. S. 504, at 510 (1981), "ERISA is a comprehensive and reticulated statute" in which Congress sought

7. Cf. Section 301(b) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(b), which states, *inter alia*, in language almost identical to section 502(d), that "[a]ny such labor organization may sue or be sued as an entity." See also *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U. S. 448 (1957), construing this language.

8. Section 2(a) is set forth in full at footnote 4, *supra*.

to ensure that workers receive the benefits promised to them. The decision by the Court of Appeals below will frustrate this laudable congressional goal.

Finally, the practical impact of the Court of Appeals for the Second Circuit's decision must not be ignored. Numerous cases may presently be pending whereby funds have sued as entities under ERISA.⁹ The dismissal of these actions may cause great hardship on funds which have sued in their own names relying on the clear language of Section 502(d).¹⁰

D. An Employee Benefit Fund Must Be Permitted to Sue as an Entity Under ERISA to Protect Participants and Beneficiaries

If the Court of Appeals for the Second Circuit's decision is permitted to stand, only the Secretary of Labor, participants, beneficiaries, or fiduciaries can bring actions to enforce ERISA. However, the Secretary of Labor, participants and beneficiaries typically have no knowledge, and lack the means to obtain information concerning any fraudulent scheme perpetuated against a fund. Only fiduciaries, *to wit*, the trustees, might have the requisite knowledge to bring suit. However, trustees may have various practical reasons for not bringing an action like this in their own name. Thus, to allow the Second Circuit's opinion to stand could disenfranchise millions of unprotected participants and beneficiaries. The facts of this case illustrate the inequity of this approach. Here the participants may have been defrauded and if the Second Circuit's view is adopted they may have no recourse since there is a serious issue as to whether the statute of limitations has expired. Viewed in this light, the Second Circuit's decision becomes manifestly unjust.

9. While it is impossible to ascertain the exact number of cases pending, the attorneys representing Petitioner have received numerous inquiries concerning the decision below from attorneys, a judge's clerk, and representatives of the United States Department of Labor.

10. After the decision by the District Court below, a second action was brought in August 1982 by two trustees and a participant entitled *Buccino, Seide and Hasslinger v. Continental Assurance Co. et. al.* (82 Civ. 5530 S.D.N.Y.). This action, however, may be barred by the statute of limitations.

An employee benefit fund under ERISA and its trustees are, in a sense, inseparable. A fund operates through trustees, and the trustees operate the fund. See *NLRB v. Amax Coal Co.*, 453 U. S. 322, 334 (1981). In fact this action is really brought on behalf of the Fund as an entity. The trustees lack the personal financial resources to support a lawsuit of this magnitude; the Fund pays all fees and costs of litigation. See ERISA 404(a)(1)(A)(ii). The Fund office contains all records pertaining to the action, and the Fund staff are knowledgeable concerning the issue at suit. Thus to require a fiduciary to bring an action as opposed to the Fund as an entity has no basis in law or fact.

Further, assuming *arguendo* that a substantive distinction exists between trustees of a fund governed by ERISA, and the fund itself as an entity, who protects the interest of the fund in litigation? For example, a lawyer retained by a corporation or similar entity owes his allegiance to the entity, and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. See Model Code of Professional Responsibility EC 5-18 (1979). If a fund as an entity is not permitted to bring actions under ERISA, and such actions are thus brought by the trustees of the fund, who represents the fund if the trustees have differing interests? A fund must have standing to sue under ERISA in order to protect the participants and beneficiaries of the fund if a conflict interests exists with respect to the trustees.

Here the Court of Appeals is exalting form over substance. Its reading of the statute is wrong. Moreover, it would perpetuate a substantial injustice. In the history of the development of law in the United States there has rarely been a situation like this where the wording of a caption on a complaint, or a technical title of a suit, has been allowed to perpetrate material injustice and judicial disenfranchisement.

The Court of Appeals below frustrates the very purpose of ERISA which is to protect participants and beneficiaries. The

decision below damages participants and beneficiaries and the tortured reading of the law clearly circumvents and frustrates the intent of Congress.

The United States Supreme Court is the final opportunity that these participants have to gain at least a chance at a final redress. All they seek is an opportunity for a day in court and a fair hearing. This should not be barred by pyramiding technicalities to allow the statute of limitations to potentially block such an opportunity. We fervently urge that they should not be denied and we pray for relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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APPENDIX

1 a

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 704

August Term, 1982

(Argued January 6, 1983)

Decided February 18, 1983)

Docket No. 82-7631

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PRESSROOM UNIONS-PRINTERS LEAGUE
INCOME SECURITY FUND,

Plaintiff-Appellant,

-against-

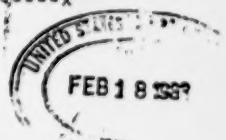
CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased,

Defendants-Appellees.

-----x
Before: KAUFMAN, TIMBERS and NEWMAN, Circuit Judges.

Appeal by the plaintiff from a judgment entered on an order of the United States District Court for the Southern District of New York, William C. Conner, Judge, dismissing its complaint for lack of subject matter jurisdiction.

Affirmed.



JOSEPH P. HOEY, Mineola, New York
(Suozzi English & Cianciullo, P.C.,
Stephen C. Glasser, of Counsel), for
the Plaintiff-Appellant.

VINCENT R. FITZPATRICK, JR., New York,
New York (White & Case, Dwight A.
Healy, Richard A. Horsch; Hughes &
Hill, H. Robert Powell, Dallas, Texas,
of Counsel), for the Defendants-
Appellees, Reserve Life Insurance Co.
and American Progressive Life and
Health Insurance Company of New York.

ROBERT S. COHEN, New York, New York
(Lans, Feinberg & Cohen, Deborah E.
Lans, of Counsel), for the Defendants-
Appellees, George S. Kriegler,
Benjamin A. Kriepler and Raymond M.
Kriepler (deceased).

KAUFMAN, Circuit Judge:

In the last decade, Congress has enacted nearly one hundred statutes pranting additional jurisdiction to the federal courts. Areas as diverse as environmental law and child custody have been brought within the purview of the federal judiciary. Exercising this new jurisdiction, however, requires us not only to adjudicate complex disputes, but also to define the limits of our expanded authority. The instant action, brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, provides one such occasion. We are called upon today to determine, as a matter of first impression, whether a pension fund may assert a federal cause of action under the provisions of that important employee benefits statute.

I

The Pressroom Unions - Printers League Income Security Fund ("the Fund") was established in May 1971 to provide life insurance and mutual fund benefits to members of the New York Printing Pressmen's & Offset Workers Union, Local 51. In later years members of two other unions were allowed to participate in the Fund pursuant to their collective bargaining agreements.^{1/} The Fund currently has approximately 1,700

participants and is financed by contributions from the employers of the union members. Its management functions are vested in a Board of Directors whose membership consists of union and employer representatives in equal numbers.

The Fund contends that during the period from July 1, 1971 through June 30, 1980 it was the victim of a fraudulent scheme engineered by appellees George S. Kriegler, Benjamin A. Kriegler and Raymond M. Kriegler, deceased. ("Krieglers") The gravamen of this charge is that George and Raymond Kriegler were officers and stockholders of Labor Security Programs, Inc. ("LSP"), a consulting firm engaged by the Fund, and they allegedly caused LSP to enter into insurance contracts at exorbitant rates. Allocation and assignment of such contracts purportedly depended upon the results of a competitive bidding process, but the Krieglers allegedly circumvented this procedure and gave appellees Continental Assurance Co. ("Continental") and Reserve Life Insurance Co. ("Reserve") the exclusive right to sell insurance to the Fund.^{2/}

The Fund's complaint alleges that the insurance contracts resulted in excessive premium payments to the insurers and extravagant fees to the Krieglers. The Fund further

contends that appellees concealed the fraudulent nature of the insurance contracts from the Board of Directors by providing misleading statements and reports. The Krieblers, it is claimed, perpetuated this fraud by providing false assurances to the Board and by misrepresenting the nature of the contracts entered into and the process through which the insurers were selected.

In January 1982 the Fund filed suit in the Southern District of New York asserting that appellees breached their fiduciary duties, and seeking declaratory relief as well as compensatory and punitive damages. Jurisdiction was said to be based upon the relevant provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(e) ("ERISA") and the Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 308(g) ("WPPDA").³/ The defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, claiming that neither statute afforded the Fund a cause of action cognizable in federal court. The district judge granted the defendants' motion and dismissed the complaint on June 3, 1982. He also denied the Fund's request to amend its complaint. Subsequently the Fund moved for reconsideration of the district court's order, and sought to substitute individual plan participants as plain-

tiffs. Judge Conner denied this request,^{4/} and the Fund now appeals from the judgment entered on his order and from the supplemental order denying its motion for reconsideration.^{5/}

II

The jurisdictional provisions of ERISA do not on their face authorize a pension fund to assert a cause of action. 29 U.S.C. § 1132(e)(1) gives the district courts "exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary or fiduciary." Similarly, § 1132(a), the Act's provision dealing with standing, states that the Secretary or a "participant, beneficiary or fiduciary" may bring an action for civil enforcement of the Act's fiduciary and other provisions.

The Fund does not contend that it may be viewed as one of the parties specifically authorized to file suit under these provisions; rather, it claims that these sections are not exclusive and do not foreclose the possibility of other parties suing under the Act. In support of this assertion, the Fund argues that § 1132(d)(1), which states that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity," contemplates the existence of a cause of action which

a pension fund may assert, and therefore necessarily implies that federal jurisdiction would exist for such suits.

It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts are not to infer a grant of jurisdiction absent a clear legislative mandate. Rice v. Railroad Co., 66 U.S. (1 Black) 358, 374 (1861); Dalehite v. United States, 346 U.S. 15, 30-31 (1953); see also Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 13-18 (1981). We therefore decline to construe § 1132(d)(1) as sub silentio conferring jurisdiction over actions brought by parties other than those specified in § 1132(e)(1).

We have previously held that an employer, also not named in ERISA's jurisdictional provisions, may not bring suit under the Act. See Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 326 (2d Cir. 1982). While this does not, of course, resolve the instant dispute, it does undercut the Fund's reliance on Fentron Industries, Inc. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982) ("Fentron"). In Fentron the court held that an employer could bring an action pursuant to ERISA. Although neither § 1132(a)

nor § 1132(e)(1) specifically authorizes suits by employers, the court observed "[t]here is nothing in the legislative history to suggest . . . that the list of parties empowered to sue under this section is exclusive. . . ." Fentron, supra, 674 F.2d at 1305.^{6/}

In our view, the Fentron court applied an inappropriate standard in resolving this issue. We focus not on whether the legislative history reveals that Congress intended to prevent actions by employers or other parties, but instead on whether there is any indication that the legislature intended to grant subject matter jurisdiction over suits by employers, funds, or other parties not listed in § 1132(e)(1). As the Ninth Circuit noted, ERISA's legislative history is silent on both of these questions, see, e.g., H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 5038, 5109 (1974), and we therefore conclude that absent such expression, § 1132(e)(1) should be viewed as an exclusive jurisdictional grant.^{7/}

What makes the instant case both unique and difficult is the language of § 1132(d)(1) which provides that a fund "may sue or be sued under this subchapter as an entity." There is no doubt that this section authorizes suits against

a fund. The difficulty arises with those portions of the section which authorize a fund to bring an action. The uncertainty generated by this language, however, is troubling only upon first blush. More careful analysis demonstrates that § 1132(d)(1) is not inconsistent with the specific and exclusive grant of subject matter jurisdiction contained in § 1132(e)(1). Subsection (d)(1) is captioned "status of employee benefit plan as entity," and only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities. Without such a provision a pension plan would not be a legally cognizable body. See, e.g., Coverdell v. Mid-South Farm Equipment Assoc., 335 F.2d 9, 12-13 (6th Cir. 1964). Affording plans the power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction.⁸ For example, if a fund became involved in a contract dispute, and wished to pursue a state law contract claim, § 1132(d)(1) would allow the fund to bring such an action in its own name.

The Fund would have us accept the argument that the carefully drafted provisions extending federal jurisdiction and standing to pension plan participants, beneficiaries and

fiduciaries were incomplete, and that those sections do not foreclose the possibility of actions brought by other parties. In light of the frequent references in the Act and its legislative history to "participants, beneficiaries and fiduciaries," see, e.g., 29 U.S.C. § 1132(h); H.R. Rep. No. 533, 93rd Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 4655 (1974), this conclusion is untenable. It is more probable that Congress's use of the words "or sue as an entity" in § 1132(d)(1) were not considered in the context of standing or jurisdiction. This interpretation is both more plausible than the Fund's view, and, as we have noted, resolves the superficial ambiguity between § 1132(d)(1) and the standing and jurisdictional provisions.

Accordingly, we hold that the district court was without subject matter jurisdiction over the Fund's complaint and Judge Conner properly dismissed the action.

III

The Fund further contends that the district court erred in denying its motion for leave to amend the complaint and substitute plan participants as plaintiffs.

The longstanding and clear rule is that "if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." Pianta v. H.M. Reich Co., 77 F.2d 888, 890 (2d Cir. 1935); see also United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir.), cert. denied, 396 U.S. 918 (1969). The Fund attempts to escape this doctrine by relying on 28 U.S.C. § 1653 which provides that "defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts."

While we have previously noted that § 1653 should be broadly construed to avoid dismissals of actions on technical grounds, John Birch Society v. National Broadcasting Co., 377 F.2d 194, 198-99 (2d Cir. 1967), we have never allowed that provision to create jurisdiction retroactively where none existed. Section 1653 allows "amendment only of defective allegations of jurisdiction; it does not provide a remedy for defective jurisdiction itself." Field v. Volkswagenwerk AG, 626 F.2d 293, 306 (3rd Cir. 1980) (emphasis in original). In this case the Fund seeks not to remedy inadequate jurisdictional allegations, but rather to substitute a new action over which there is jurisdiction for one where it did not exist. Accordingly, Judge Conner properly denied the Fund's motion to

amend its complaint pursuant to that provision.^{9/}

The Fund's reliance on Rheingold Breweries Pension Plan v. PepsiCo, Inc., 2 Empl. Ben. Case. 2406 (S.D.N.Y. 1981), is also misplaced. In Rheingold Judge Stewart permitted amendment after holding that the plaintiff fund had no standing to sue under § 1132(a). The court, however, never reached the more fundamental issue of whether there was subject matter jurisdiction over such an action. Moreover, the Rheinpold opinion, filed before the Fund's suit was commenced, should have put the Fund in this case on notice that it would have difficulty in pressing its claims under its own name. Even if the district court had the authority to consider the propriety of the amendment request, therefore, it could have properly denied the motion in its discretion. See Cox v. Livingston, 407 F.2d 392 (2d Cir. 1968) (motions to amend pursuant to § 1653 are addressed to the court's discretion). If the Fund was aware of Judge Stewart's ruling, it has advanced no reason for its original failure to name alternative plaintiffs in the event that Judge Conner followed Rheingold and refused to allow the Fund to sue in its own name. In the event that the Fund was unaware of the Rheingold case, it cannot now assert that it detrimentally relied on that portion

of the opinion where the court allowed the plaintiff to amend its complaint.

Accordingly, we find Judge Conner properly concluded that there was no subject matter jurisdiction to hear the claims asserted and he correctly granted appellees' motion to dismiss. Because it was without jurisdiction, the judge appropriately denied the request to amend the complaint. The judgment and supplemental order of the district court are affirmed.

FOOTNOTES

1/ Beginning in May 1975 members of the New York Press Assistants and Offset Workers Union, Local 23 became participants in the Fund, and in May 1976 coverage was extended to employees represented by the Paper Handlers and Sheet Straighteners, Local 1.

2/ Continental underwrote the life insurance contracts for plan participants from 1971 until July 1979. Thereafter Continental's rights and obligations were assumed by Reserve which became the successor in interest to the former corporation upon its dissolution. Reserve, a Texas corporation not licensed to do business in New York State, transacted its affairs in New York through its wholly-owned subsidiary, American Progressive Life & Health Corporation.

3/ The WPPDA antedated and was repealed by ERISA. The relevant section of ERISA, however, provided that the WPPDA "shall continue to apply to any conduct and events which

occurred before [ERISA's] effective date, [January 1, 1975]." 29 U.S.C. §§ 1031(a)(1), 1144.

4/ In its motion for reconsideration, the Fund, for the first time, identified those persons it sought to substitute as plaintiffs. These individuals have since filed a separate action in the United States District Court for the Southern District of New York, Buccino v. Continental Assurance Co., No. 82 Civ. 5530. The parties have represented, however, that there are potential statute of limitations problems which may preclude a full decision on the merits in that action.

5/ The Fund does not challenge the district court's finding that there was no jurisdiction under the WPPDA.

6/ The Fund mistakenly relies on United States Steel Corp. v. Pennsylvania Human Relations Commission, 669 F.2d 124 (3rd Cir. 1982), in support of its claim that § 1132(a) is not exclusive. The court in United States Steel did not imply that the specific standing provision of § 1132(a) was not exclusive, but held only that on the facts of that case the

plaintiff employer could be viewed as a plan fiduciary and therefore have standing as a fiduciary under the Act. Id. at 126-28.

7/ Since the plaintiff has not claimed subject matter jurisdiction under 28 U.S.C. § 1331 (1976) in its complaint nor in its papers submitted to this Court, we express no views on the possible relevance of that statute. See Monell v. Department of Social Services, 532 F.2d 259, 260 n.1 (2d Cir. 1976), rev'd on other grounds, 436 U.S. 658 (1978).

8/ The district judge indicated that in some circumstances a fund might be a participant, beneficiary or fiduciary, in which case it would be able to assert a cause of action in its own name. In the district court's view this possibility resolved the ambiguity between § 1132(e)(1) and § 1132(d)(1). We find it difficult to imagine a situation in which a fund could fulfill one of these roles. See 29 U.S.C. § 1002(7), (8), (21) (definitions of "participant," "beneficiary," and "fiduciary"). We do not, however, believe it is necessary to accept the district court's view to reconcile the apparently contradictory provisions.

2/ Appellant also claims that the district court was foreclosed from dismissing its complaint pursuant to Fed. R. Civ. P. 17(a). That rule in relevant part states, "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed . . . [for] joinder or substitution of the real party in interest." This argument, however, ignores the fact that the action was not dismissed for failure to name the real party in interest, but rather because the district court had no jurisdiction over the suit. Rule 17(a) does not, of course, expand the jurisdiction of the federal judiciary. See Fed. R. Civ. P. 82.

United States Court of Appeals

SECOND CIRCUIT

#82-7631

PRESSROOM UNIONS-PRINTERS
LEAGUE INCOME SECURITY FUND,

Plaintiff-Appellant

v.

CONTINENTAL ASSURANCE CO.,
et al.,

Defendants-Appellees

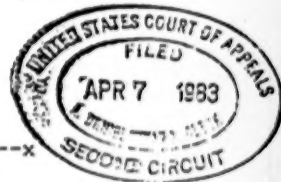
OPINION

KAUFMAN, CHIEF JUDGE ~~CHIEF JUDGE~~ C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April, one thousand nine hundred and eighty-three.

Present: HONORABLE IRVING R. KAUFMAN
HONORABLE WILLIAM H. TIMBERS
HONORABLE JON O. NEWMAN,
Circuit Judges.



PRESSROOM UNIONS-PRINTERS LEAGUE INCOME
SECURITY FUND,

Plaintiff-Appellant,

v.

82-7631

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by Joe Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased,
Defendants-Appellees.

Upon consideration of appellant's petition for rehearing, it is hereby ORDERED that the opinion filed February 18, 1983, is amended in the following respects:

Docket No. 82-7631
Page Two

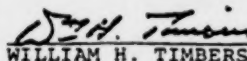
1. Page 1888, lines 13-16 - "Subsection (d)(1) is captioned "status of employee benefit plan as entity." and only establishes the right of plans created by ERISA to sue and be sued like corporations and other legal entities." is hereby amended to read "Subsection (d)(1) only establishes the right of employee benefit plans created by ERISA to sue and be sued like corporations and other legal entities."

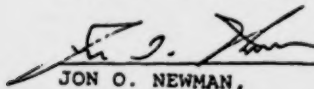
2. Page 1890, Footnote 9 - The following paragraph is hereby added as the first paragraph in Footnote 9.

"Though we have previously recognized that an amendment adding a party that brings the case within a district court's jurisdiction can be granted, Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), cert. denied, 313 U.S. 559 (1941), such an amendment, where new service is required, does not relate back to the original suit, id. at 99, and would be a new action, id.; York v. Guaranty Trust Co., 143 F.2d 503, 518 (2d Cir. 1944) (construing Hackner), rev'd on other grounds, 326 U.S. 99 (1945). In such circumstances, the district court has discretion whether to permit the "amendment," cf. National Maritime Union v. Curran, 87 F. Supp. 423, 426 (S.D.N.Y. 1949), and Judge Conner properly exercised his discretion to deny the motion to amend after noting that possible statute of limitations defenses distinguished this case from Hackner, where no such obstacles appeared."

3. The petition for rehearing is otherwise denied.


IRVING R. KAUFMAN


WILLIAM H. TIMBERS


JON O. NEWMAN,

Circuit Judges

OPINION AND ORDER DATED JUNE 3, 1982 (Pages 65a-73a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESSROOM UNIONS - PRINTERS LEAGUE :
 INCOME SECURITY FUND, :
 : 82 Civ. 578
 Plaintiff, : (WCC)
 :
 - against - :
 :
 CONTINENTAL ASSURANCE CO., a Member of the : OPINION
 C.N.A. Group, RESERVE LIFE INSURANCE CO., : AND ORDER
 and its wholly owned subsidiary AMERICAN :
 PROGRESSIVE LIFE & HEALTH INSURANCE :
 COMPANY OF NEW YORK, GEORGE S. KRIEGLER, :
 BENJAMIN A. KRIEGLER, LABOR SECURITY :
 PROGRAMS, INC., and RAYMOND M. KRIEGLER, :
 deceased, by John Doe, Mary Moe and Roe :
 Corp. 1-10, the true names of the pre- :
 ceding defendants being presently unknown :
 to plaintiff, the foregoing fictitious names :
 intending to designate the executors, :
 administrators, trustees, successors in :
 interest and heirs-at-law of the said :
 Raymond M. Kriegler, deceased, :
 Defendants. :

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Of Counsel

CONNER, D. J. :

This action purportedly arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and the Welfare and Pension Plans Disclosure Act ("WPPDA"), 29 U.S.C. § 301, et seq., as well as under certain statutes and the common law of the State of New York. Jurisdiction over the state law claims is alleged to be based upon principles of pendent jurisdiction. Presently before the Court are the motions of various defendants to dismiss the amended complaint for lack of jurisdiction over the subject matter, Rule 12(b)(1), F.R.Civ.P. For the reasons which follow, the motions are granted.

Plaintiff Pressroom Unions-Printers League Income Security Fund (the "Fund") is identified in the amended complaint as an employee income security fund within the meaning of Section 3(1) of ERISA, 29 U.S.C. § 1002(1), and an employee benefit plan subject to the provisions of ERISA pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a).

Defendant Continental Assurance Co. ("Continental") is alleged to have underwritten the Fund's life insurance from July 1, 1971 through July 1, 1979. Defendants Reserve Life Insurance Co. ("Reserve") and its wholly-owned subsidiary American Progressive Life & Health Insurance Company of New York ("Progressive") are alleged to have acquired the rights and obligations of Continental as underwriters of the Fund's life insurance during the period subsequent to July 1, 1979.

Defendants George S. Kriegler, Raymond M. Kriegler, deceased, and Benjamin A. Kriegler are identified as having been administrators and/or fiduciaries of the Fund. Defendant Labor Securities Programs, Inc. ("LSP") is a corporation owned and managed at least in part by George Kriegler and Raymond Kriegler.

As to the claims arising under federal law, it is essentially alleged that each of the defendants engaged in a fraudulent scheme directed against the Fund in violation of each defendant's fiduciary obligations under ERISA.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), specifies the Secretary of Labor, participants, beneficiaries and fiduciaries as those persons who have standing to prosecute a civil action under ERISA. In turn, Section 502(e) of ERISA, 29 U.S.C. § 1132(e), limits the jurisdiction of United States district courts to civil actions brought by the Secretary of Labor, participants, beneficiaries or fiduciaries.

It is not disputed that the Fund is not the Secretary of Labor, a participant, a beneficiary or a fiduciary as those terms are defined in ERISA. Accordingly, it is manifest both that this Court lacks subject matter jurisdiction over the Fund's ERISA claims and that the Fund lacks standing to prosecute such claims. This Court has previously so held in Rheingold Breweries Pension Plan v. Pepsico, Inc., No. 81 Civ. 1561 (S.D.N.Y. November 17, 1981) (Stewart, J.). See also

Mechanical Construction Corp. v. Benedict, No. 76 Civ. 5426 (S.D.N.Y. March 16, 1978) (Conner, J.); Hibernia Bank v. International Brotherhood of Teamsters, 411 F. Supp. 478, 488-89 (N.D.Cal. 1976).^{1/}

The Fund's reliance on Section 502(d) of ERISA, 29 U.S.C. § 1132(d), is misplaced. That section provides that an employee benefit plan may sue or be sued as an entity, and further provides for service upon and enforcement of judgments against such plans. Section 502(d) addresses neither jurisdiction nor standing, but rather the legal capacity of a fund to sue or be sued as an entity. In other words, if a fund was also a participant, beneficiary or fiduciary so that it had standing to sue under Section 502(a), 502(d) makes it clear that it could sue as an entity.

Accordingly, the Fund's ERISA claims against each of the defendants must be dismissed for lack of subject matter jurisdiction.^{2/}

The Fund also seeks to predicate subject matter jurisdiction upon Section 9(g) of WPPDA, 29 U.S.C. § 308(g), although the amended complaint nowhere alleges that any of the alleged conduct of defendants violated any provision of WPPDA. In any event, it is plain that the Fund lacks standing to prosecute any claim under WPPDA. The only private right of action available under WPPDA is one brought by a participant or beneficiary to recover \$50 per day from any plan administrator

who fails to make certain requested publications. As the Fund is not a participant or a beneficiary, it lacks standing to prosecute any action under WPPDA.

Accordingly, the Fund's WPPDA claims, if any, against each of the defendants must be dismissed.^{3/}

In view of the dismissal of the purported federal law claims, the exercise of pendent jurisdiction over the Fund's state law claims would be inappropriate. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Accordingly, the amended complaint is dismissed, without prejudice to the prosecution of any state law claims in a court of competent jurisdiction.^{4/}

SO ORDERED.

William E. Conner
United States District Judge

Dated: New York, New York

June 3, 1982

FOOTNOTES

In a recent decision, *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. April 21, 1982), the Ninth Circuit permitted an employer to bring suit under ERISA notwithstanding the fact that the employer did not fit within the definition of any of those authorized to bring suit by Section 502(a). The court first found that the employer had suffered an injury in fact and that such injury fell within the zone of interests protected by ERISA. After thus concluding that the employer had standing in the constitutional sense, the court then directed its inquiry to whether the statute itself precluded the suit, and specifically the fact that employers qua employers are not among those authorized to bring suit under Section 502(a). In this regard, the court merely concluded:

"The omission of employers from 29 U.S.C. § 1132 is not significant in this regard. There is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers" (footnote and citations omitted). *Id.* at 1305.

The court's reasoning is not persuasive. As the court recognized, the existence of standing in the constitutional sense is not a sufficient basis for maintenance of a statutory cause of action in the face of a statutory prohibition. Here Congress, by Section 502(a), has specified those who may bring suit under the statute. If unspecified others may also bring suit, then Section 502(a) is meaningless. Manifestly a statutory provision should not be interpreted in such a manner as to render it meaningless. Yet the *Fentron* court reaches such a result, and does so on the basis of legislative history which is admittedly silent on the question of the exclusivity of Section 502(a).

Furthermore, the *Fentron* court ignores Section 502(e), which limits federal court jurisdiction to the actions specified in Section 502(a). Congress could hardly have more clearly specified that this Court's jurisdiction is limited exclusively to actions brought by those authorized to sue under Section 502(a).

2. Although only Reserve, Progressive, George Kriegler, Benjamin Kriegler and Raymond Kriegler have moved to dismiss, Continental has raised this defense in its Answer, and in any event the absence of subject matter jurisdiction prevents this Court from entertaining the ERISA claims as to any defendant. See Rule 12(h)(3), F.R.Civ.P.
3. Again although not all defendants have moved to dismiss, this defense appears in the Answer of Continental, the Fund's lack of standing plainly precludes its prosecution of any WPPDA claim against any defendant, and the Fund has had notice and the opportunity to be heard on this issue in connection with this motion. Accordingly, no sound reason appears why the Court's ruling as to the WPPDA claims should not be made applicable to all defendants.

It should also be noted that WPPDA, which was repealed by 29 U.S.C. § 1031(a)(1) except as to conduct and events occurring prior to January 1, 1975, cannot apply to Reserve and Progressive, whose alleged transgressions all post-date July 1, 1979.

4. The Fund has requested that, in the event the motions of defendants are granted, it be given leave to amend the complaint to name a proper plaintiff. The request is denied. Since the Fund has no claim over which this Court has subject matter jurisdiction, the Fund cannot be a proper plaintiff in this action.

Plainly what the Fund envisions is a substitution of another plaintiff for itself. Such an amendment would involve not merely the correction of a misnomer as to the proper plaintiff, but rather a substitution of an unrelated party to prosecute the action. Moreover, the Fund has not identified such a party or indicated that any party is willing to be so substituted. Since this Court lacks jurisdiction over the Fund's claims, I can

hardly retain jurisdiction while the Fund searches for a substitute plaintiff. Prior to the dismissal of this action, a proper plaintiff might have moved to intervene, but no such application has been made.

OPINION AND ORDER DATED AUGUST 2, 1982 (Pages 90a-104a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

PRESSROOM UNIONS - PRINTERS LEAGUE
INCOME SECURITY FUND,

Plaintiff,

- against -

CONTINENTAL ASSURANCE CO., a Member of the
C.N.A. Group, RESERVE LIFE INSURANCE CO.,
and its wholly owned subsidiary AMERICAN
PROGRESSIVE LIFE & HEALTH INSURANCE
COMPANY OF NEW YORK, GEORGE S. KRIEGLER,
BENJAMIN A. KRIEGLER, LABOR SECURITY
PROGRAMS, INC., and RAYMOND M. KRIEGLER,
deceased, by John Doe, Mary Moe and Roe
Corp. 1-10, the true names of the pre-
ceding defendants being presently unknown
to plaintiff, the foregoing fictitious names
intending to designate the executors,
administrators, trustees, successors in
interest and heirs-at-law of the said
Raymond M. Kriegler, deceased,

Defendants.

- - - - - X

82 Civ. 578
(WCC)

OPINION
AND ORDER

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Of Counsel

CONNER, D. J.:

By Opinion and Order dated June 3, 1982, familiarity with which is presumed, this Court granted defendants' motions to dismiss for lack of jurisdiction over the subject matter, Rule 12(b)(1), F.R.Civ.P. The crux of the Court's June 3 ruling was that plaintiff Pressroom Unions-Printers League Income Security Fund (the "Fund") is not within those categories of persons authorized to bring suit under Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), and thus that the Fund's claims do not fall within this Court's subject matter jurisdiction as defined by Section 502(e) of ERISA, 29 U.S.C. § 1132(e). The Court also denied the Fund's application for leave to "amend" the complaint to "name a proper plaintiff" in the event the Court ruled as it did in granting defendants' motions.

Presently before the Court is the motion of the Fund to alter or amend the judgment of dismissal pursuant to Rule 59(e), F.R.Civ.P. For purposes of this motion, the Fund seeks only reconsideration of that portion of the Court's June 3 ruling which denied the Fund's request to "amend" the complaint after its dismissal in order to "name a proper plaintiff." For the reasons that follow, the Fund's motion is denied.

In originally denying the Fund's application to amend, the Court wrote:

The Fund has requested that, in the event the motions of defendants are granted, it be given leave to amend the complaint to name a proper plaintiff. The request is denied. Since the Fund has no claim over which this Court has subject matter jurisdiction, the Fund cannot be a proper plaintiff in this action.

Plainly what the Fund envisions is a substitution of another plaintiff for itself. Such an amendment would involve not merely the correction of a misnomer as to the proper plaintiff, but rather a substitution of an unrelated party to prosecute the action. Moreover, the Fund has not identified such a party or indicated that any party is willing to be so substituted. Since this Court lacks jurisdiction over the Fund's claims, I can hardly retain jurisdiction while the Fund searches for a substitute plaintiff. Prior to the dismissal of this action, a proper plaintiff might have moved to intervene, but no such application has been made.

In an apparent effort to "cure" what it perceived to be the defect in its original application, the Fund has submitted affidavits indicating the willingness of at least one participant and beneficiary of the Fund to be substituted as a plaintiff in this action. It may be assumed that the proposed substituted plaintiff or plaintiffs are "proper plaintiffs" pursuant to Section 502(a) of ERISA and thus that this Court would have subject matter jurisdiction over such an action pursuant to Section 502(e) of ERISA. Nevertheless, the Fund's motion must be denied.

Nothing in the Court's June 3 Opinion and Order inhibits in any way the ability of any party enumerated in Section 502(a) to bring an action within this Court's subject matter jurisdiction as specified by Section 502(e). Instead, however, the Fund seeks to resurrect an action over which the Court does not, and never did, have subject matter jurisdiction³ in order to file a purported "amendment" substituting other plaintiffs for itself and thus retroactively converting the action into one over which this Court has jurisdiction. Both reason and precedent dictate that the Court is without power to grant the relief sought by the Fund.

It is axiomatic that, as a court of circumscribed jurisdiction, this Court's power is limited to those actions which Congress has specified to be within its jurisdiction. "If a court lacks jurisdiction over an action, it lacks the power to act with respect to that action." Rudick v. Laird, 412 F.2d 16, 20 (2d Cir.), cert. denied, 396 U.S. 918 (1969). Thus, as defendants persuasively contend, where as here the Court lacks jurisdiction over the action, it lacks the power to act on a motion such as that made by the Fund.^{1/}

Several court decisions in analogous circumstances support defendants' position. Thus, for example, in Pianta v. H. M. Reich Co., 77 F.2d 888 (2d Cir. 1935), a creditor with a claim for less than the jurisdictional amount necessary for diversity jurisdiction sought the appointment of a receiver

for the debtor corporation. The receivers who had been appointed sought to remedy the jurisdictional defect nunc pro tunc by obtaining an order of the district court directing the intervention of a creditor whose claim exceeded the jurisdictional amount. The Court of Appeals reversed that order and directed dismissal of the claim:

We think the district judge has no power to enter such an order. The right to intervene presupposes an action duly brought, and if jurisdiction is lacking at the commencement of the suit, it cannot be aided by the intervention of a creditor with a sufficient claim.

Id. at 890.

In Interstate Commerce Commission v. Southern Railway Co., 380 F. Supp. 386 (M.D.Ga. 1974), aff'd in relevant part, 543 F.2d 534 (5th Cir. 1976), the court found that the ICC did not have statutory authority to maintain the action; the statute provided that such suits must be brought by or against the United States. In dismissing the action, the court held that its conclusion could not be affected by motions of interested persons to intervene and to name the United States as a party, reasoning that

it is elementary that jurisdictional defects in the original complaint cannot be remedied by the papers of intervenors, nor can authority to bring a suit be bestowed by intervenors on an original plaintiff where no such authority existed prior to intervention.

* * *

Given the presence of a fatal defect in the ICC's complaint, it is, of course, plain that the complaint must be dismissed, and from this it follows that there remains no action in which Nashville Milling Company and Mr. Lee may intervene.

Id. at 394-95.

In Jacobs v. District Director of Internal Revenue, 217 F. Supp. 104 (S.D.N.Y. 1963), the court found that it was without jurisdiction as the suit was barred by the doctrine of sovereign immunity. The United States sought to intervene in an "attempt to give the court the jurisdiction it now lacks." Id. at 106. The court denied the motion to intervene, ruling that such intervention "cannot be granted as there is present no jurisdictional foundation upon which the court may act." Id.

In Oster v. Rubinstein, 136 F. Supp. 733 (S.D.N.Y. 1955), the court found an absence of diversity of citizenship between the plaintiffs and the original defendant. The plaintiffs, however, had substituted the original defendant's executors as defendants, and there did exist diversity of citizenship between the plaintiffs and the substituted defendants. The court nevertheless dismissed the action for lack of subject matter jurisdiction, ruling that "jurisdiction may not be conferred upon the court by means of a substitution of parties." Id. at 734.^{2/}

And in Schmoll Fils, Inc. v. The Fernglen, 85 F. Supp. 578 (S.D.N.Y. 1949), where the court found diversity of citizenship jurisdiction lacking, the court refused to allow the intervention of a United States corporation as a party plaintiff. Although the presence in the suit of the proposed intervenor would have been sufficient to establish federal jurisdiction, the court concluded that

[i]ntervention may not be allowed for that purpose. An existing suit within the Court's jurisdiction is a prerequisite to intervention. Intervention cannot give life to a lawsuit which does not actually exist, nor can it create jurisdiction where no jurisdiction exists.

Id. at 579.

See also, Turner v. First Wisconsin Mortgage Trust, 454 F. Supp. 899, 913 (E.D.Wisc. 1978) ("a plaintiff who cannot maintain her own complaint has no right to amend it pursuant to Rule 15 of the Federal Rules of Civil Procedure to bring in other parties who will thereafter remain as parties when the complaint is dismissed as to the original plaintiff"); Schwartz v. The Olympic, Inc., 74 F. Supp. 800, 801 (D.Del. 1947) ("Plaintiff also seeks to amend his complaint to bring in other parties plaintiff. If he cannot maintain his own complaint, he has no right to amend it").

In the face of these arguments and authorities, the Fund has offered five contentions in support of its position, which it now perorades the Court to alter its original ruling.

The Fund places primary reliance upon 28 U.S.C. § 1653, which provides:

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

However, the plain language of Section 1653, as well as the cases interpreting it, indicate that Section 1653 is limited to permit amendment of formal pleading deficiencies only, and does not permit the retroactive creation of jurisdiction by substantive amendments. See, e.g., Church of Scientology v. United States, 499 F. Supp. 1085, 1088 (D.Colo. 1980).³⁷ Thus, for example, amendment has been permitted under Section 1653 to alter the theory of subject matter jurisdiction existing at the time the action was commenced, see, e.g., Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615, 618 (S.D.N.Y. 1979), modified on other grounds, 629 F.2d 786 (2d Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Miller v. Davis, 507 F.2d 308, 311 (6th Cir. 1974), or to correct defective allegations as to jurisdictional amount, see, e.g., Schlesinger v. Councilman, 420 U.S. 738, 744 n.9 (1975); Cox v. Livingston, 407 F.2d 392 (2d Cir. 1969). On the other hand, amendment under Section 1653 has been denied where the amendment seeks to add a distinct cause of action not pleaded in the original complaint. Brennan v. University of Kansas, 451 F.2d 1287, 1289 (10th Cir. 1971).

In the instant case, the jurisdictional "defect" in the Fund's complaint is not one merely of form but rather one of substance. The Fund does not have any claims against defendants within the subject matter jurisdiction of this Court, and there is no formal amendment of the pleadings that can alter that fact. What the Fund seeks is not to correct a mere technical error in its own pleading in order that it may continue its action against defendants, but rather, by the purported device of an "amendment," to permit a different party or parties to prosecute the action. No precedent for such a result has been cited by the Fund or discovered by the Court. But cf., Field v. Volkswagenwerk AG, 626 F.2d 293, 306 (3d Cir. 1980) (suggesting in dictum that in an action for wrongful death on behalf of the deceased's estate, the substitution of one administratrix for another may be permitted under certain circumstances pursuant to Section 1653). In my view, the Fund's attempt to bootstrap substitute plaintiffs into an action which this Court's jurisdictional limitations do not permit the Fund itself to maintain is not an attempt to cure a mere technical error of pleading but is rather an attempt to effect a substantive modification of an action over which the court otherwise lacks subject matter jurisdiction, and is thus not permissible under Section 1653.

The Fund's other four arguments may be treated summarily in connection with the dismissal of the Fund's state law claims under the principles of United Mine Workers v. Gibbs, 393 U.S.

715 (1966), the Court noted that such dismissal was without prejudice to the prosecution of such state law claims in a court of competent jurisdiction. The Fund contends that, in so ruling, the Court "overlooked or misapprehended" the "principle of law" that the district courts of the United States have exclusive jurisdiction over the relevant ERISA claims which constitute the "vast majority" of the Fund's claims. The Fund is wrong. By this Court's June 3 Opinion and Order, it has been determined, subject to the Fund's right of appeal, that the Fund has no ERISA claims against defendants. Other parties may have claims under ERISA against defendants, but nothing in this Court's June 3 ruling creates any jurisdictional bar to the prosecution of such claims.

The Fund further argues that its "default" is excusable because of its reliance on Rheingold Breweries Pension Plan v. Pepsico, Inc., 81 Civ. 1561 (S.D.N.Y. November 17, 1981), in which Judge Stewart of this Court, after ruling that an employee benefit plan could not maintain an action under Section 502(a) of ERISA, granted leave for plaintiff to amend its complaint to name a proper plaintiff.^{4/} In that case, however, Judge Stewart treated the issue solely as one of standing under Section 502(a) and did not address the question of subject matter jurisdiction under Section 502(e), and thus did not consider whether there was a jurisdictional bar to the granting of leave to amend. In any event, there is no "equitable" exception to the absolute inability of this Court to entertain ERISA subject matter jurisdiction.

The Fund's final two arguments appear for the first time in its reply memorandum. First, the Fund argues that the requirements of subject matter jurisdiction and standing are legally distinct; that the Court's June 3 ruling was in reality a ruling that the Fund lacked standing to prosecute this action; that the action should thus have been dismissed under Rule 12(b)(6), F.R.Civ.P., for failure to state a claim and not under Rule 12(b)(1), F.R.Civ.P., for lack of subject matter jurisdiction; and that as a consequence the Court does have subject matter jurisdiction to entertain and grant the Fund's motion to amend. The Fund's argument ignores the relevant statutory provisions of ERISA. While it is true that the constitutional requirements for standing are distinct from the question of subject matter jurisdiction, Congress has created additional statutory standing requirements in Section 502(a) and, in Section 502(e), incorporated those requirements as prerequisites to the exercise of subject matter jurisdiction. Thus, under the statutory scheme, the Court properly dismissed the action for lack of subject matter jurisdiction, which itself is a prerequisite to the Court's consideration of any motion to dismiss for failure to state a claim.

Finally, the Fund relies upon Rule 17(a), F.R.Civ.P., which proscribes the dismissal of any action on the ground that it is not prosecuted in the name of the real party in interest without allowing an opportunity for substitution of

the real party in interest. The Fund's reliance is misplaced; this action was dismissed for lack of subject matter jurisdiction and not for failure of prosecution in the name of the real party in interest. That it might also have been dismissed under Rule 17(a) after an opportunity for substitution hardly means that this "opportunity" is extended to cases such as the instant case where the court lacks subject matter jurisdiction. Plainly Rule 17(a) does not purport to expand the subject matter jurisdiction of the federal courts, and the rule is thus irrelevant to the Court's June 3 decision and the instant motion.

For these reasons, the Fund's motion to alter or amend the judgment is denied.

SO ORDERED.


United States District Judge

Dated: New York, New York
August 2, 1982

FOOTNOTES

1. Defendants concede, as they must, that an apparent exception to this principle is the line of cases permitting the dropping of nondiverse parties who are not indispensable in order to preserve diversity jurisdiction; i.e., in order to satisfy the requirement of "complete" diversity first enunciated in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch 267 (1806)). The rationale of these decisions appears to be that the cause of action among the diverse parties is conceptually distinct, and the deletion of unnecessary parties in order to "preserve" or "retain" diversity jurisdiction over this separable portion of the lawsuit is thus permissible. See, e.g., *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (18); *Kerr v. Compagnie De Ultramar*, 250 F.2d 860 (2d Cir. 1958); *Karakatsanis v. Conquistador Cia. Nav., S.A.*, 247 F. Supp. 423 (S.D.N.Y. 1965). The justification for this approach may perhaps be found in the fact that the requirement of "complete" diversity, in contrast to federal jurisdiction generally, is not of constitutional dimension. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1966). In any event, this line of cases appears to be sui generis and to have no implication for circumstances such as exist here, where the Court lacks jurisdiction over every "portion" of the case, and what the proposed amendment would accomplish is not the "dropping" of an unnecessary party in order to "preserve" jurisdiction, but rather the complete substitution of a new plaintiff or plaintiffs in order to create retroactively jurisdiction where none had existed before.

2. The court in *Oster* distinguished *Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941), in which the court permitted a new plaintiff to prosecute an action in which the original plaintiffs' claims failed to satisfy the jurisdictional amount requirement. A reading of the *Hackner* opinion, however, reveals that the court permitted that result solely because, as a practical matter, requiring the new plaintiff to commence a new action would eventually bring the parties

to the same position they occupied in the existing lawsuit. In light of the Second Circuit's prior opinion in Pianta, 77 F.2d 888, it does not appear that the Hackner result should apply where, as here, there are possible statute of limitations defenses which the plaintiff seeks to avoid by resurrecting a case over which the court lacks subject matter jurisdiction.

3. As detailed in the Memorandum of Law of Defendants Reserve Life Insurance Co. and American Progressive Life and Health Insurance Company of New York, the legislative history of Section 1653 and its predecessor statute also indicates that the purpose of Section 1653 is to avoid the nonsuit of a plaintiff which could have but did not include the proper allegations of jurisdiction in the complaint, rather than permitting substantive modifications of an action over which the court lacks subject matter jurisdiction.
4. The Fund's claim of reliance on Rheingold is most surprising, since that decision should have put the Fund on notice that it could not maintain this action.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-second day of April, one thousand nine hundred and eighty-three.

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PRESSROOM UNIONS-PRINTERS LEAGUE INCOME
SECURITY FUND,

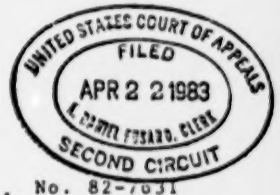
Plaintiff-Appellant,

v.

CONTINENTAL ASSURANCE CO., et al.,

Defendants-Appellees.

-----X



No. 82-7031

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Pressroom Unions-Printers League Income Security Fund, and the panel that heard the appeal having denied said petition in an order filed on April 7, 1983,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by

Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk